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ABSTRACT

In an attempt to integrate research on the impact of judicial selection and research on journalist-source interaction, a study considered the method by which judges are selected and retained and how this method influences the exchange relationship between sources and journalists in trial courts. Elected trial court judges in Minnesota and appointed judges in an unnamed northeastern state were surveyed to test three hypotheses: (1) that in states where judges are elected and retained by public vote, they should be more willing to communicate with the public through interaction with journalists; (2) that because they are arguably more directly accountable to the public, elected judges would be more likely to cooperate with journalists in order to achieve publicity, thus enhancing the journalists' relative power in the exchange; and (3) that elected judges will attend more to the media's coverage of the judiciary, again enhancing the relative power of the journalist. In terms of overall communication behavior, results indicated that in fact judges who were elected cooperated more with journalists than appointed judges, were more likely to cooperate for publicity reasons, and were more likely to read media coverage of courts. Results also seemed to indicate that elected judges inherently have an incentive to seek communication links with the public. (CRH)

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Judicial Selection Methods and Judge-Journalist Relationships in Trial Courts

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Political scientists, legal scholars, judges, attorneys and others have long been interested in the impact of various methods of selecting judges. Reduced to its fundamental elements, the debate over how best to select the judiciary has crystalized around the question of how most appropriately to balance judicial independence and accountability.[1] If anything, this debate has been made even more keen because of research suggesting that judicial elections are frequently rather pitiful events plagued by low turnout, ignorant voters and invisible candidates.[2]

Meanwhile, scholars of mass communication and government have sought to understand in a more theoretical sense the nature of the interaction between journalists and government officials that results in news.[3] Some, although relatively little, of that work has focused on interaction between journalists and judicial sources.[4] Much of the research has used an exchange model to explain the nature of journalist-source relationships. The idea is simply that, either consciously or unconsciously a quid pro quo quality shapes the relationships and significantly affects what does and does not emerge as news. A central question becomes who needs whom most. To the degree that the power relationship favors journalists, the flow of information will be enhanced or at least less subject to sources' manipulation; to the degree that it favors sources, the flow of information will be controlled or at least constricted or more vulnerable to sources' manipulation.

This study attempts to integrate research on the impact of judicial selection and research on journalist-source interaction by considering whether the method by which judges are selected and retained influences the exchange relationship between sources and journalists in the trial courts.

States vary considerably in how they select judges. One recent summary found that 32 states use either partisan or nonpartisan elections, seven use appointment followed by retention elections in which voters are merely asked whether judge so-and-so shall be retained in office, and the remaining 11 rely exclusively on appointment and reappointment without any elections.[5] At least theoretically, selection via competitive election highly values judicial accountability to the public, while non-elective methods place a higher premium on judicial independence. The use of noncompetitive retention elections after initial appointment based on merit falls somewhere between the extremes.

But does method of selection really make a difference? Much of the extant research indicates that it may not. Several studies suggest that appointment and/or retention election systems do not produce judges whose background characteristics differ significantly from those of judges who are elected competitively.[6] Further, there is little evidence that judges' personal characteristics are related to their judicial decisions anyway.[7] Attempts to link selection method with judges' decisional tendencies also have been less than successful.[8]

In part, these findings may be related to the fact that many elected judges are initially appointed,[9] and, regardless of selection method, judgeships are generally secure positions. Few incumbents are turned out of office and

even in states with partisan or nonpartisan elections, judges often run unopposed.[10] And for their part, voters are frequently hopelessly uninformed about judicial candidates.[11]

Other scholars have asked whether nonlegal, environmental or regional differences among states aren't more important than selection method in understanding the characteristics and behavior of state judges. The results are somewhat difficult to synthesize and generalize. Although it appears that certain state demographic and economic characteristics may be correlated with certain selection plans, those differences do not necessarily result in the ascension to the bench of dramatically different types of people in different states.[12] Indeed, when Jacob studied the characteristics of judges in states in different regions and using different selection methods, he concluded that it is unlikely that state peculiarities, degree of urbanism or party competition make much difference.[13] Comparing elected and appointed trial judges in one state, Dubois obtained results somewhat more ambiguous than Jacob's. Although he found some regional differences among judges, he also found that the overall demographic similarity of judges persisted even after controlling for region.[14] Canon, after studying 479 state supreme court justices, concluded that geographic region appeared to be a more important variable than political culture, but that region and selection method overlapped so much that it was difficult to determine which might be the more important variable.[15]

Gibson considered slightly different environmental variables in a study of the sentencing behavior of judges in Iowa state courts. After finding sup-

port for a hypothesis that judges' behavior would be related to their perceptions of the nonlegal attributes of the counties in which they presided, he found support for a hypothesis that the strength of a judge's linkage to the local environment could be accounted for in part by a judge's fear of electoral rejection.[16] Although Gibson was not directly studying the impact of various methods of judicial selection, one might logically speculate that more judges must inherently fear electoral rejection in states that force them regularly to face voters than in states that do not.

The research which has thus far attempted to study the impact of methods of judicial selection on the behavior of trial court judges has relied heavily on sentencing behavior as the crucial dependent variable. In essence, this study suggests that another dependent variable worth examining may be judges' communication behavior. If we reduce judicial selection methods to a dichotomy -- methods which require elections and methods which do not -- logic suggests that judges who must face voters should be more cognizant of a need to communicate with the public than judges who never need face voters. Since the media are a prime source of public information about the judiciary, differences in judges' communication behavior ought to be manifest in their communication relationships with journalists and the news media.[17] And in fact, a study of interaction between journalists and judicial sources in Minnesota led Drechsel to speculate that some of the differences among sources' behavior might be a function of their elected or nonelected status.[18]

Holding the focus to judges only, then, one testable hypothesis ought to be that judges who must face elections are more likely to cooperate with journalists than judges who never need face elections. This, of course, would

suggest that under an exchange theory of reporter-source interaction, in election states the relative power of judicial reporters will be enhanced while that of judges will be diminished.

A second hypothesis relates to the reasons for which judges might cooperate with journalists. Assuming that publicity is an exchange commodity, and one likely to be more important to elected than nonelected judges, we would expect that judges who must face elections are more likely to cite publicity-oriented reasons for cooperation with journalists than are judges who never face elections. Because elected judges arguably are more directly accountable to the public, these publicity reasons may be either rather narrow and personal, or broader and public-oriented. Again, such a finding would suggest that to the degree that judges "need" journalists more in elective states, the power of journalists in the exchange ought to be enhanced.

Finally, if elected judges are more oriented toward communication with the public, it would be logical to expect them to be quite interested in what the news media report about the judiciary. Therefore, a third hypothesis is that judges who must face elections will be more likely to attend to media coverage of the courts than judges who never face elections. And this, too, would enhance the relative power of journalists in exchange interaction with judges.

METHOD

Four years ago, Drechsel surveyed state trial court judges in Minnesota, obtaining data on their cooperation with newspaper reporters, their reasons for

cooperating, and their newspaper use. Two-thirds of the state's 207 judges responded. Minnesota judges are elected on a nonpartisan ballot.[19] Drechsel justified focusing on state trial courts and newspapers on grounds that such courts are accessible to the most reporters, probably the most personally familiar to the public, and the most covered by the media. Further, newspapers are more likely than broadcasters to have reporters routinely covering the judiciary.[20]

In 1983, an opportunity arose to administer the same survey instrument to trial court judges in a northeastern state where judges are nominated by the governor, confirmed by the legislature and never face voters.[21] The questionnaires were administered during a judges' workshop, and responses were obtained from 78 percent (97) of the state's 125 trial court judges. State court administrators conditioned scholarly publication of the results on the researcher's promise not to name the state.[22] Pearson product-moment coefficients were computed to help examine the relationship between the variables.

RESULTS

Table 1 indicates that the first hypothesis -- that judges in the elective state are the more likely to cooperate with journalists -- finds strong support. Far more elective than appointive judges will provide all types of assistance to journalists. The same difference is reflected in the judges' response to a question about whether they have ever sought out a local newspaper reporter with unsolicited information or explanation. Seventeen per-

cent of the elective judges but only 2 percent of the appointive judges said they had ($r=.24$, $p < .0002$). Clearly, judges in the elective system appear far more willing than judges in the appointive system to make themselves accessible and to cooperate with journalists. Such findings, of course, are consistent with reasoning that judges accountable to voters ought to be sensitive to the importance of a continuing communication link with them. It is not surprising that the judges in the elective system are more willing to explain themselves and to help assure informed, accurate reporting.

(INSERT TABLE 1 ABOUT HERE)

The second hypothesis -- that judges in elective systems are the more likely to cite publicity reasons for cooperation with journalists -- also finds strong support, as Table 2 shows. The data also indicate a distinction between publicity reasons oriented to the judge personally, if not selfishly, and those at least seemingly more oriented toward concern for the public interest and the judiciary as an institution. Very few appointive judges appear concerned about the impact of publicity on them personally. Notably more appear concerned over building public support for judicial decisions and responding to a public right to know. The same relationship holds among the elective system judges, but far more of them than appointive judges concede having more personal reasons for cooperating with journalists. And the elective judges are also more likely than the appointive judges to imply deference to a public interest.

(INSERT TABLE 2 ABOUT HERE)

Of course, in fairness it must be conceded that in absolute terms, relatively few judges in either system seem attuned to cooperating for selfish publi-

TABLE 1

Percentage of Judges Who Have Provided
or Would Provide Various Types of Assistance to Reporters

Type of Assistance	Judges: Elective System	Judges: Appointive System	"r"
Factual information about a case	76% (127)[a]	30% (94)	.46
Explanation of legal technicalities, legal language or the judicial process itself	95 (131)	59 (94)	.46
Judge's opinion about some aspect of a case or speculation about its outcome	9[b] (128)	2 (94)	.15
Suggestions steering reporter to stories	46 (129)	14 (94)	.34
Help deciding whether a case will be worth coverage	42 (126)	11 (94)	.34
Explanation of something judge has done in handling a particular case	86 (124)	38 (94)	.49
Help confirming accuracy of something reporter has written or is writing	89 (127)	47 (94)	.46
An interview for a judicial story, but not related to coverage of a particular case	94 (129)	61 (92)	.41
Access to and/or copying of court records	89 (130)	58 (93)	.35
Nothing in particular; just a chat	93 (121)	62 (87)	.39

[a]Number in parentheses indicates "n"; unless otherwise noted, differences between selection methods are significant at the .0001 level.

[b]$p < .05$.

TABLE 2

Percentage of Judges Who Have Cooperated or Would Cooperate with Reporters for Various Reasons

Reason for Cooperating	Judges: Elective System	Judges: Appointive System	"r"
It can be satisfying to see one's name in the newspaper	18%	1%[a]	.27
Good newspaper reporting can build public support for judicial decisions	84	54	.34
Publicity is important to a public official	25	2	.32
The people have a right to know	80	46	.35
Judge welcomes chance to explain his/her actions or other court action	53	12	.42
Through press, members of bar and bench can find out what judge is doing	17	3	.22
Reporter is competent and knowledgeable	48	26	.22
Fairly or not, reporter or newspaper may be uncooperative, critical or hostile if judge doesn't cooperate	16	8[b]	.12
Reporter may reciprocate and provide judge with useful or interesting information	6	0[c]	.16
Judge wants to avoid errors in stories	84	34	.51
	n=134	n=97	

[a]Differences are significant at the .001 level except as noted.

[b]$p < .05$.

[c]$p < .01$.

TABLE 3

Judges' Use of Newspapers' Court Coverage

Use		Judges: Elective System	Judges: Appointive System
For useful information about judicial action	not at all	30%	53%
	some	61	42
	great deal	9	5[a]
As indicator of courts' image	not at all	13	20
	some	68	67
	great deal	19	13[b]

[a] $r = -.22$, $p < .001$ (elective "n" = 135; appointive "n" = 94).

[b] $r = -.12$, $p < .05$ (elective "n" = 134; appointive "n" = 93).

city reasons. This should be not surprising, since judgeships are generally such secure positions. Nevertheless, even in terms of the more selfish interests, judges in the two systems differ significantly.

The third hypothesis suggested that judges who must face elections will be the more likely to attend to media coverage of courts. And it, too, finds support in the data. Ninety-one percent of the elective system judges but only 62 percent of the appointive system judges said they generally read newspaper accounts of non-jury cases they handle ($r=.35$, $p<.0001$). In cases involving juries, 91 percent of the elective but 70 percent of the appointive judges generally read newspaper accounts ($r=.27$, $p<.0001$). The two sets of judges also differed significantly when asked to what degree they relied on newspapers for useful information about judicial action, as Table 3 indicates. The elective system judges are significantly more likely to make such use of the media. When asked about the degree to which they used newspaper coverage as an indicator of public image of local courts, the judges again differed significantly in the expected direction.

(INSERT TABLE 3 ABOUT HERE)

Given such findings, it may be understandable why fewer of the appointive judges (81 percent) than elective judges (95 percent) reported having ever been contacted by a newspaper reporter ($r=.21$, $p<.001$). Although it may be risky to speculate on which is cause and which is effect, one reasonable interpretation might be that the general unwillingness of the appointive judges to cooperate discourages some journalists. Such an interpretation may also be consistent

with the finding that appointive judges report noticing reporters in the courtroom more frequently than the elective judges.[23] Perhaps reporters in the appointive system are forced to rely more on observation to gather information than reporters in the elective system.

Finally, it should not be surprising that more of the elective than appointive judges reported having openly disagreed with a reporter or editor about the way some court action had been covered. Nearly 70 percent of the appointive system judges said they had never had such open disagreement, compared to only 38 percent of the elective system judges ($r = -.21$, $p < .0001$). Logically, if publicity is more important to an elected judge than to an appointed judge, the former would have more incentive to ensure accurate coverage and defend and protect himself or herself from the harm of misleading coverage. On the other hand, the elective judges reported noticing errors in fewer stories than the appointive judges. Fifty-three percent of the elective but only 42 percent of the appointive judges reported noticing factual errors in fewer than one-fourth of all stories about cases they handled. Conversely, 22 percent of the appointive versus 15 percent of the elective judges reported noticing errors in three-fourths or more of all stories. Although at first this finding might seem unexpected, it may simply emphasize elective judges' sensitivity to publicity. That is, the elective judges are far more likely than appointive judges to let reporters and editors know they are unhappy with coverage even though they notice fewer errors.

DISCUSSION

Several scholars of judicial selection have suggested that electing judges doesn't necessarily increase their accountability, and that nonpartisan elections might even reduce accountability.[24] "Elections and direct channels of participation," Jacob has written, "do not normally serve as feedback devices in the judiciary."[25] This study, however, suggests that such conclusions may be overdrawn or at least that a slightly different approach to the concept of accountability may be in order. Jacob may be correct in his conclusion that judicial elections do not normally serve as feedback mechanisms, at least in any direct manner. But providing feedback may be only part of the accountability function of judicial elections.[26] Whether judges virtually always win re-election may simply be beside the point. So may the ignorance of many voters. What may matter most is the symbolic value of knowing that at regular intervals one must face the voters.

Consequently, the real value of judicial elections may be that they lead judges to seek some sort of communication link with the public. This sort of communication behavior may in a larger sense be more important to society than any variations in judges' criminal sentencing patterns. "[J]udicial representation no longer is contingent upon highly informed, knowledgeable, active mass publics," Gibson has noted. "Rather it is the motivation of the representative that is the key to the process."[27] Electoral accountability may well provide a significant portion of that motivation.[28]

If electoral accountability does lead judges to be more communication-conscious, we are nevertheless led back to the more philosophical question of

whether such a result is desirable. Regardless of where one's values lie, this study may at least suggest that the grounds on which debate may be waged can fruitfully be broadened. That is, even if the links between judicial selection and the characteristics of individual judges and judicial behavior are questionable, we can now ponder a different question: the relationship between judicial selection methods and judges' communication behavior. We may have an important new dependent variable to address.

This study also has implications for scholarship on journalist-source interaction. First, it provides additional evidence for Drechsel's hypothesis that sources in the judicial branch of government generally have relatively little need for journalists' prime exchange commodity -- publicity.[29] This commodity would seem to be devalued even further in appointive judicial systems with one result being that the flow of information from at least one important group of sources is further constricted. This constriction could well lead journalists to seek out more accessible, cooperative and potentially biased sources in the judicial system. Thus, the problem of less than ideal flow of information from the judicial branch becomes circular -- a source is uncooperative, therefore journalists begin to avoid that source and thus the source becomes yet more isolated. Although it is impossible to know whether any given problem really begins with a source or with a journalist, the result is the same. And the likelihood of such problems would seem to be exacerbated if an appointive system of selecting judges is in fact a strong disincentive for those officials even to try cooperating with the media.

Second, the results can be interpreted as support for the general exchange model of understanding journalist-source interaction. As one would expect, appointive judges, who valued publicity less, were also less likely to cooperate with journalists. And this may have been precisely why the response also indicated that some journalists -- apparently without much power in the relationship -- avoid direct contact with judges. Conversely, elective judges, who valued publicity more, were also more likely to cooperate.

Finally, the limitations of the study must be addressed. Is it possible, for example, that a major variable other than method of selection is responsible for the differences between states? Could it be cultural, political or economic differences, not judicial selection, that are crucial? Admittedly, the two states are not a perfectly matched pair, and certainly it is possible that at least some of the variance can be explained by other factors. Further, the present study is in essence a comparison of two case studies. Perhaps the most reasonable response is that previous research has suggested that selection method may well be a more important variable than regional or other characteristics.[30] In any case, the results of this study must be considered within this possible limitation.

Likewise -- as in most of the other studies of judicial selection -- the assumption is that selection method is correlated with accountability. It is possible that such is not the case, and future work ought to try more directly to measure this variable. Perhaps accountability is more appropriately treated as an attribute of individual judges than of the system. However, we might

then expect to see this attribute somewhat randomly distributed among judges, making less likely the extreme differences found in this study.

SUMMARY

This study has compared the communication behavior of trial court judges who face elections with the communication behavior of those who do not. As hypothesized, the judges in the state using judicial elections were more likely to cooperate with journalists than judges in the state without judicial elections; the elected judges were more likely to cooperate for publicity reasons; and they were also more likely to read news media coverage of courts. These differences may be explained by the incentive elected judges seem inherently to have to seek communication links with the public.

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FOOTNOTES

[1]The literature has become voluminous. For an indication of the leading studies, see the references in the following footnotes.

[2]See footnotes 10-11 below.

[3]See, e.g., Leon V. Sigal, Reporters and Officials: the Organization and Politics of Newsmaking (Lexington, Mass.: D.C. Heath & Co., 1973); Bernard C. Cohen, The Press and Foreign Policy (Princeton: Princeton University Press, 1963); Dan D. Nimmo, Newsgathering in Washington (New York: Atherton, 1964). See generally, Jay G. Blumler and Michael Gurevitch, "Politicians and the Press: An Essay on Role Relationships," in Dan D. Nimmo and Keith R. Sanders, eds., Handbook of Political Communication (Beverly Hills: Sage, 1981), pp. 467-93.

[4]Robert E. Drechsel, News Making in the Trial Courts (New York: Longman, 1983); David L. Grey, The Supreme Court and the News Media (Evanston: Northwestern University Press, 1968); F. Dennis Hale, "How Reporters and Justices View Coverage of a State Appellate Court," Journalism Quarterly 52 (1975): 106-10.

[5]Larry Berkson, Scott Beller and Michele Grimaldi, Judicial Selection in the United States: A Compendium of Provisions (Chicago: American Judicature Society, 1981), pp. 25-30.

[6]See, e.g., Larry L. Berg, Justin J. Green, John R. Schmidhauser and Ronald S. Schneider, "The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Systems," Western Political Quarterly 28 (1975): 263-80; Bradley C. Canon, "The Impact of Formal Selection Processes on the Characteristics of Judges--Reconsidered," Law and Society Review 6 (1972): 579-93; Philip L. Dubois, "The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: the Case of California," Justice System Journal 8 (1983): 59-87; and Victor E. Flango and Craig R. Ducat, "What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort," Justice System Journal 5 (1979): 25-44.

[7]Flango and Ducat, p. 34.

[8]Ibid., p. 39; Stuart S. Nagel, Comparing Elected and Appointed Judicial System (Beverly Hills: Sage Professional Paper, 1973), p. 12; Ronald Schneider and Ralph Maughan, "Does the Appointment of Judges Lead to a More Conservative Bench? The Case of California," Justice System Journal 5 (1979): 45-57. Although one fascinating study has found major differences between the sentencing behavior of judges elected on nonpartisan versus partisan ballots, it does not argue that selection method in and of itself is the explanation. Martin A. Levin, "Urban Politics and Judicial Behavior," Journal of Legal Studies 1 (1972): 193-221, 193-2.

[9]See, e.g., Albert P. Melone, "Political Realities and Democratic Ideals: Accession and Competition in a State Judicial System," North Dakota Law Review 54 (1977): 187-208.

[10]James Eisenstein, Politics and the Legal Process (New York: Harper and Row, 1973), p. 69; William Jenkins Jr., "Retention Elections: Who Wins When No One Loses," Judicature 61 (1977): 79-86; Herbert Jacob, "Judicial Insulation -- Elections, Direct Participation and Public Attention to the Courts in Wisconsin," Wisconsin Law Review 1966: 801-19.

[11]David Adamany and Philip Dubois, "Electing State Judges," Wisconsin Law Review 1976: 731-79, 778; Charles A. Johnson, Roger C. Schaefer and R. Neal McKnight, "The Salience of Judicial Candidates and Elections," Social Science Quarterly 59 (1978): 371-78; Kenyon N. Griffin and Michael J. Horan, "Merit Retention Elections: What Influences the Voters?" Judicature 63 (1979): 78-88.

[12]Flango, pp. 33-34.

[13]Herbert Jacob, "The Effect of Institutional Differences in the Recuitment Process: the Case of State Judges," Journal of Public Law 13 (1964): 104-19, 113.

[14]Dubois, pp. 74-82.

[15]Canon, pp. 582, 592 n.5.

[16]James L. Gibson, "Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision Making," Law and Society Review 14 (1980): 343-70.

[17]See, e.g., The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers and Community Leaders (Williamsburg,Va.: National Center for State Courts, 1978), p. 2; The American Public, the Media and the Judicial System (New York: Hearst Corp., 1983), p.6; R. Neal McKnight, Roger Schaefer and Charles A. Johnson, "Choosing Judges: Do the Voters Know What They're Doing?" Judicature 62 (1978): 94-99, 97.

[18]Drechsel, pp. 107-108, 121-29.

[19]Ibid, p. 97.

[20]Ibid., p. 6.

[21]Reappointment is handled similarly, although a recommendation on appropriate action is made by a judicial review council. Judges have virtually always been reappointed.

[22]Of course, the author will provide the name "off the record" to those who wish to know.

[23]Thirty percent of the appointive judges but only 16 percent of the elective judges said they noticed a reporter in the courtroom at least weekly; 12 percent of the appointive, but only 2 percent of the elective judges, reported noticing a reporter in court daily ($r=.27$, $p < .0001$). Of course, state demographic differences could have some impact on this finding.

[24]See, e.g., Adamany and Dubois, p. 776; Stephen L. Wasby, "Arrogation of Power or Accountability: 'Judicial Imperialism' Revisited," Judicature 65 (1981): 208-19, 218.

[25]Jacob, "Judicial Insulation," p. 819.

[26]Jacob also mentions the function of elections as possible legitimizers of judicial action. Ibid.

[27]Gibson, p. 365.

[28]Indeed, Gibson has correctly pointed out that even though judges have little to worry about so far as their retention in office is concerned, the prospect of elections still has an impact because the rare nonretention has a disproportionate psychological impact. Ibid., p. 367.

[29]Drechsel, pp. 24-27, 130-31. The study also contradicts Drechsel's initial assumption that judges' concerns about re-election should not be an important factor in explaining their interaction with journalists. Ibid., p. 26. Drechsel may simply have approached the election issue too narrowly -- that is, it may well be relatively unimportant in terms of their communication behavior that judges are almost certain to be retained in office.

[30]See footnotes 13 and 14.

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